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# In the Supreme Court of the United States

OCTOBER TERM, 1947.

## No. 665.

LUCILLE SCHUCKMAN,
*Petitioner,*

v.

LAWRENCE J. RUBENSTEIN, HARVEY T. GRACELY, STANLEY R. GRANT, MAYNARD E. MONTROSE, J. MALCOLM STRELITZ, OGDEN B. HEWITT, HAMILTON PELL and MARION POWER SHOVEL COMPANY,
*Respondents.*

## BRIEF OF RESPONDENTS GRACELY, MONTROSE, STRELITZ AND MARION POWER SHOVEL COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

WILLIAM B. COCKLEY,
ARTHUR L. DOUGAN,
J. MALCOLM STRELITZ,
*Attorneys for Harvey T. Gracely, Maynard E. Montrose, J. Malcolm Strelitz, and Marion Power Shovel Company, Respondents.*

JONES, DAY, COCKLEY & REAVIS,
1759 Union Commerce Building,
Cleveland, Ohio,

STRELITZ, DOWLER & HALBERSTEIN,
Citizens Building,
Marion, Ohio,
*Of Counsel.*

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## INDEX.



## TABLE OF AUTHORITIES.

### Cases.

**Statutes.**

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### SUPPLEMENTARY STATEMENT OF THE CASE.

The petitioner's statement of the case is so filled with unwarranted characterizations of her complaint that we must restate the issues completely.

The questions involved in this case are these:

1. Must the United States District Court in Ohio entertain an action to compel the declaration of dividends on stock of an Ohio corporation where only one-fourth of the directors have been subjected to the jurisdiction of the Court?

2. Jurisdiction being based on diversity of citizenship, was the dismissal of the complaint properly affirmed on the alternative ground that a defendant, who was a proper but

* We do not understand how petitioner arrived at the list of respondents included in her petition. She has omitted some of the defendants who were not served, including Grant who is a resident of the same state as the petitioner, but has included Rubenstein who was not served.

not indispensable party, was a resident of the same state as the plaintiff?

3. Should the plaintiff, a preferred stockholder, in an action to compel the declaration of a dividend, have been permitted to file a supplemental complaint for an injunction against a reduction of stated capital of the common stock?

There is no issue in this case as to the payment of a dividend already declared. As stated by the Circuit Court of Appeals, this claim of the petitioner is an afterthought (R. 37). The complaint prayed that the defendants be required "*to declare*" a dividend (R. 11).

The petitioner's statement of the facts does not include the status and citizenship of all the persons named as parties. The plaintiff is a resident of New York. Marion Power Shovel Company is an Ohio corporation. The individuals named as defendants were alleged to be directors of the defendant corporation. Hewitt and Pell are residents of New Jersey and Connecticut, respectively (R. 2). Rubenstein is a resident of Massachusetts (R. 15). Grant is a resident of New York (R. 16), although alleged in the complaint to be a resident of Ohio (R. 2). The other three defendants, Gracely, Montrose and Strelitz are residents of Ohio. Two other directors, Diefenbach and Terry, are residents of New York and were not made parties (R. 2).

Only three individual defendants were served, Gracely, Montrose and Strelitz, and of these three Montrose had resigned as a director before he knew of the pendency of this action (R. 14-15) or was served with summons (R. 22). The petitioner's unsupported claim that Rubenstein waived his personal privilege of venue (P. Br. 15) is explained and disposed of in the opinion below (R. 33) and requires no further discussion in this brief.

Thus, at the time defendants' motion to dismiss was made, only two directors of a board of eight had been

served with summons and one of the parties defendant not served was a resident of the same state as the plaintiff. The plaintiff did not at any time dismiss the defendant Grant whose joinder as a party destroyed the diversity of citizenship.

## ARGUMENT.

**1. No federal question of jurisdiction or procedure is raised by the holding that a majority of the directors are indispensable parties to an action to compel the declaration of dividends.**

The decision of the two lower courts that this action cannot proceed in the absence of a majority of the Board of Directors is fundamentally a question of corporation law, not federal jurisdiction or procedure. Sections 50 and 51 of the Judicial Code, 28 U. S. C. A. Sections 111, 112, are not in controversy. There is no doubt that if a majority of the directors are indispensable parties the action cannot proceed without them, notwithstanding the provisions of Section 50 of the Judicial Code; *Swan Land and Cattle Co. v. Frank*, 148 U. S. 603 at 611, and cases there cited. There can also be no doubt that if a majority of the directors are indispensable parties, the petitioner is not aided by Section 51 of the Judicial Code, 28 U. S. C. A., as amended in 1936. That amendment has to do with obtaining jurisdiction of the corporation in a stockholder's suit in the district where the corporation could have obtained jurisdiction of the necessary directors. *Koster v. (American) Lumbermans Mutual Casualty Co.*, 330 U. S. 518 at page 522, footnote 2.

The Circuit Court of Appeals, after a thorough study of the statutes of Ohio and the common law of Ohio and other states as to the discretion of a board of directors in declaring dividends and the great unwillingness of courts to interfere with that discretion, came to the conclusion that a majority of the directors are indispensable parties. The leading cases are:

*Johnson v. Lamprecht*, 133 O. S. 567;
*Dodge v. Ford Motor Co.*, 204 Mich. 459;
*Kales v. Woodworth*, 32 Fed. (2) 37 (C.C.A. 6);
*Tower Hill Connellsville Coke Co. of West Virginia v. Piedmont Coal Company*, 33 Fed. (2) 703 (C.C.A. 4).

The court in this aspect of the case decided a question of Ohio corporation law and there is no occasion for this Court to review its decision.

The petitioner states the question as though she had been deprived of any forum in which to sue (P. Br. 5). This is incorrect. The decision deprives her of a *federal* forum in which to sue. The language of this Court in *Indianapolis v. Chase National Bank*, 314 U. S. 63 at page 76, discussing a similar ruling, is most apt:

> "This is not a sacrifice of justice to technicality. For the question here is not whether Chase and Indianapolis Gas may pursue what they conceive to be just claims against the City, but whether they may pursue them in the federal courts in Indiana, rather than in its state courts. The fact that Chase prefers the adjudication of its claims by the federal court is certainly no reason why we should deny the plain facts of the controversy and yield to illusive artifices. Settled restrictions against bringing local disputes into the federal courts cannot thus be circumvented.
>
> "These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See *Madisonville Traction Co. v. Mining Co.*, 196 U. S. 239, 255, and *Ex parte Schollenberger*, 96 U. S. 369, 377. The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state

courts,' in order to keep them free for their distinctive federal business * * *." (p. 76.)

In the Ohio state court the petitioner will not be embarrassed either by the non-residence of the respondents, who can be served when they attend meetings, nor by the residence of certain of the directors in New York, whose presence would destroy diversity of citizenship, Ohio General Code, Section 11,276.* She has in large part created the difficulties which thwart her in this action by electing to sue in the federal court.

**2. There is no conflict between the decision in this case and the case of Galdi v. Jones.**

Petitioner argues that there is a conflict between this case and *Galdi v. Jones*, 141 Fed. (2) 984 (C. C. A. 2). In that case a minority stockholders' suit was brought in the United States District Court in Connecticut by a resident of New York against the corporation's directors, one of whom was a resident of New York. There was a diversity of citizenship between all the other parties, except the New York director, Smythe, and he died pending appeal. The Circuit Court of Appeals said that the New York director was not an indispensable party and that dismissing him would not have prevented the District Court from proceeding. However, since he died pending appeal the question as to what disposition the Court of Appeals would make of the case if he were still a party was not before it. That question faced the Circuit Court of Appeals in the case at bar.

Admittedly the petitioner in this case could have dismissed Grant in the District Court and if the court had jurisdiction of a majority of the directors without him, it could have proceeded. The petitioner did not dismiss Grant. Therefore, as the case was presented to the Cir-

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*A transitory action may be brought against a non-resident "* * * where such defendant is found * * *."

cuit Court of Appeals, there was a lack of diversity. The cases cited by the court below amply support its conclusion that in this situation the appellate court cannot itself dismiss the party whose presence destroys the diversity.*

*Levering & Garrigues Company v. Morrin*, 61 Fed. (2d) 115, C. C. A. 2nd;

*Dollar S. S. Lines v. Merz*, 68 Fed. (2) 594, C.C.A. 9th;

*International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 121 Fed. (2) 561 (C. C. A. 8th);

*Alderman v. Elgin, J. & E. Ry. Co.*, 125 Fed. (2d) 971, C. C. A. 7th;

*Continental Insurance Company v. Rhoads*, 119 U. S. 237;

*Halsted v. Buster*, 119 U. S. 341.

The decision of this Court with respect to the diversity of citizenship point is, therefore, entirely in harmony with *Galdi v. Jones*, and supported by an abundance of authorities in this Court and other Circuit Courts of Appeals. In any event, the jurisdictional ruling merely reinforced the holding that a majority of the directors are indispensable parties and did not control the disposition of this case either in the Circuit Court of Appeals or in the District Court.

### 3. The denial of leave to file a supplemental complaint raises no federal question of importance.

The supplemental complaint attacked the validity of the reduction of stated capital of the corporation, which was authorized at a stockholders' meeting held three months after the complaint was filed. There was no con-

* If the dismissal of the action were not required on other grounds (absence of indispensable parties), the dismissal of Grant might have been permitted in the District Court after remand. See *Levering & Garrigues Company v. Morrin, supra.*

nection between the two transactions. The District Court, in exercising its discretion not to permit this entirely unrelated transaction to be litigated in the same action as the dividend question, acted entirely within its powers. Furthermore, since the original complaint had to be dismissed there was no pleading for the second complaint to supplement. No new service of process was obtained on it. The denial of leave to file the supplemental complaint deprived no one of a substantial right or raised any question which it is desirable for this Court to decide.

## CONCLUSION.

The controlling question in this case, whether a majority of the directors must be before the Court as defendants in an action to require the declaration of dividends, is one of Ohio corporation law and does not concern this Court. The decision of the Circuit Court of Appeals on diversity of citizenship is not in conflict with any other decision and does not dispose of the case. The ruling of the District Court on the supplemental complaint is inconsequential. The petition for certiorari should, therefore, be denied.

Respectfully submitted,

WILLIAM B. COCKLEY,
ARTHUR L. DOUGAN,
J. MALCOLM STRELITZ,

*Attorneys for Harvey T. Gracely, Maynard E. Montrose, J. Malcolm Strelitz, and Marion Power Shovel Company, Respondents.*

JONES, DAY, COCKLEY & REAVIS,
1759 Union Commerce Building,
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